REDACTED VERSION

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers	)	D.T.E. 03-60

OPPOSITION OF VERIZON MASSACHUSETTS TO THE LOOP/TRANSPORT CARRIER COALITION'S MOTION TO STRIKE

Verizon Massachusetts ("Verizon MA") opposes the motion to strike portions of its direct and supplemental testimony filed by Broadview Networks, Inc., Choice One Communications of Massachusetts, Inc., Focal Communications Corporation of Massachusetts and XO Massachusetts, Inc. (the "Loop/Transport Carrier Coalition" or "LTCC").

The LTCC seeks to strike all parts of Verizon MA's testimony and attached exhibits that demonstrate satisfaction of the wholesale triggers for dedicated transport and loops defined in the FCC's *Triennial Review Order*.[1] As grounds, the LTCC asserts that the *Triennial Review Order* limits the kind of evidence which the Department may review in this proceeding to so-called "route-specific" evidence. Because Verizon MA's evidence is not "route-specific," claims the LTCC, it is not relevant to Verizon MA's transport case and is insufficient to allow the Department to find that the routes and loops identified by Verizon MA satisfy the FCC's wholesale triggers.

[1] The wholesale triggers require the Department to find non-impairment if two or more CLECs along a transport route offer DS1, DS3 or dark fiber transport at wholesale, or two or more CLECs are willing and able to make loop facilities available at wholesale to a particular customer location.

The LTCC's motion has no basis in law or fact. To begin with, it depends entirely on a gross distortion of the *Triennial Review Order*. Though the FCC clearly expects state commissions to identify particular transport and loop routes on which CLECs are not impaired, nothing in the *Order* purports to establish a new standard of admissibility limiting the evidence on which a state commission may rely in identifying such routes to individualized facts unique to each route. As to the kind of evidence the Department will consider in this proceeding, the applicable rule is 220 CMR § 1.10(1), under which Verizon MA's evidence is indisputably relevant and admissible.

Moreover, the motion misstates Verizon MA's ample evidence in support of its wholesale transport triggers case, showing that: (1) the carriers identified as wholesale providers in Exhibit 3 to Verizon's Supplemental Panel Testimony have deployed fiber transport along the routes identified in that exhibit; and (2) that these carriers offer dedicated transport to other carriers in Massachusetts on a widely available basis. In the absence of any evidence to the contrary (as is the case here), Verizon MA's evidence forms a reasonable evidentiary basis to conclude that these carriers are in fact willing and able to sell to other carriers access to the routes identified in Exhibit 3. The evidence Verizon MA has submitted on this point, detailed below, includes CLEC wholesale tariffs, advertisements on carrier websites and admissions made by numerous CLECs in response to the Department's information requests.

Verizon MA's claim that certain transport routes in Massachusetts satisfy the FCC's wholesale trigger for DS1 transport is also fully supported by information in the record, and the LTCC's request in the alternative to strike that claim should likewise be denied.

I. The Evidence Verizon MA Has Submitted on the Wholesale Transport and Loop Triggers Is Relevant and Admissible under the Department's Rules, and Nothing in the *Triennial Review Order* Precludes Admission of Such Evidence.

A. Verizon MA's evidence is relevant and admissible under 220 CMR § 1.10(1).

The rule of evidence applicable to this proceeding is found in 220 CMR § 1.10(1) of the Department's Procedural Rules, which states that, "[t]he Department shall follow the rules of evidence observed by courts when practicable ...." The Department has also made it clear that it is not bound by the rules of evidence:

> However, by selectively excerpting the wording of 220 C.M.R. s. 1. 10(1), DOER's claim flatly contradicts a well established principle of administrative law found in statute. Pursuant to G.L. c. 30A, s. 11(2), agencies need not adhere to the rules of evidence observed by courts, but may admit evidence and give testimony probative effect if it is the kind of evidence on which reasonable persons are accustomed to rely on in the conduct of serious affairs.

The Berkshire Gas Company, D.T.E. 01-56, at 6 (2002).

The Department's rule is otherwise silent on the issue of relevance, excluding only that evidence which is "unduly repetitious or cumulative or such evidence as is not of the kind on which reasonable persons are accustomed to rely in the conduct of serious affairs." In Massachusetts courts, evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Proposed Mass. R. Evid. 401; *see also* Liacos, *et al.*, Handbook of Massachusetts Evidence, at 108 (7th ed. 1999). The Supreme Judicial Court has defined relevant evidence as that which has a "rational tendency to prove an issue in the case." *Commonwealth v. Fayerweather*, 406 Mass. 78, 83 (1989). The court explained further in *Fayerweather* that in order to be relevant, evidence "must render the desired inference more probable than it would be without the evidence." *Id*.

The evidence Verizon MA has submitted in support of its wholesale transport and loops triggers case falls well within this definition. That evidence consists for the most part of statements made by the CLECs themselves in response to the Department's information requests that they have deployed fiber on the routes or locations at issue and either offer such facilities at wholesale or have obtained same from other carriers in the state. This evidence is supplemented by CLECs' representations on their websites and in their tariffs. For example, the fact that Fibertech, AboveNet (formerly MFN) and Neon all advertise on their websites their eagerness to lease their dedicated transport to other carriers, *see* Verizon MA Initial Panel Testimony filed on November 14, 2003, at 45-46, has an obvious "tendency to make … more … probable" that these carriers offer at wholesale the particular routes in Massachusetts identified by Verizon MA in its Supplemental Panel Testimony. Likewise, the fact that Williams Local, AboveNet and AT&T all have Massachusetts tariffs on file offering dedicated transport to other carriers, *see id*., Attachment 8, has a "rational tendency to prove" that these carriers in fact make their Massachusetts transport routes widely available to other carriers. The admissions of carriers in response to the Department's Information Request DTE-1-4, sent to CLECs, that they do or could, if asked, offer their dedicated transport facilities to other carriers clearly "throw[] light" on the issue as well. *See, Adoption of Carla*, 416 Mass. 510, 513 (1993). The statements of many CLECs in response to Information Requests DTE-1-2 and DTE-1-3 that they have purchased dedicated transport in Massachusetts from carriers identified by Verizon MA as wholesale providers "render[s] [it] … more probable" that those carriers offer the disputed transport routes at wholesale than if such evidence had not been submitted. Finally, the responses of a number of carriers to the Department's information requests, identifying the customer locations to which

they have deployed their own fiber loops, has a "rational tendency to prove" the existence of those loops.

These are examples only, and do not exhaustively canvas the evidence Verizon MA has offered. They make absolutely clear, however, that the LTCC cannot rationally contend that Verizon MA's evidence is anything less than highly relevant, under the Department's evidentiary rule and practices, to the issue of the wholesale availability of the transport and loop routes Verizon MA has identified as meeting the wholesale triggers in this proceeding.

B. Nothing in the *Triennial Review Order* precludes admission of Verizon MA's evidence in support of its wholesale triggers case, nor does the Order require Verizon MA to offer so-called "route-specific" evidence.

The LTCC does not seriously argue that Verizon MA's evidence does not meet the Department's relevance standard. Rather, the crux of the LTCC's motion is its assertion that this evidence runs afoul of a new rule of admissibility promulgated in the *Triennial Review Order* which, says the LTCC, precludes the Department from relying on any evidence with respect to Verizon MA's transport case other than "granular," "route-specific" evidence uniquely particularized to each route in question. *See* Motion at 2, 4-5. In support, the LTCC argues that the FCC delegated to the states the task of identifying those specific routes and customer locations in a given market for which CLECs are not impaired, through applications of the various transport and loop triggers, because the FCC lacked sufficiently detailed evidence on which to make such findings itself. Motion at 4. The LTCC also relies heavily on the statement in ¶ 417 of the *Triennial Review Order* that, in conducting their route-specific transport analyses, state commissions "need only address routes for which there is relevant evidence in the proceeding that the route satisfies one of the triggers …." (*See also*, similar statement in ¶ 339, pertaining to loops.) From these meager ingredients, the LTCC conjures up new evidentiary

"rules, which require Verizon to produce evidence on a customer-specific and location-specific basis" in order to prevail on its transport case. Motion at 6, 3.

The LTCC's alleged "rules" are a phantasm. Neither the text of the *Triennial Review Order* nor the purpose for which the FCC delegated fact-finding duties to state commissions supports the LTCC's legal legerdemain. Verizon MA does not dispute that the FCC believed it had insufficient evidence before it on which to identify each and every transport route or customer location across the nation which satisfies an applicable trigger. That the FCC therefore delegated that task to the states as being in a better position to gather such evidence, however, in no way suggests the particular level of detail that a state commission must reach in order to find no impairment on a given set of routes. Certainly, this purpose alone does not explain why state commissions' investigations should be limited only to facts tailored to each particular route in issue. There is more than one way to prove that a set loops or dedicated transport routes is available at wholesale. One way is to demonstrate, as Verizon MA has done here, that a particular carrier has deployed its own fiber along certain routes and that the carrier generally offers to sell access to its routes to other carriers. The LTCC has failed to offer any policy reason why the FCC would want state commissions to ignore such highly probative information – information that is undisputedly relevant under the Department's and the common law's traditional conception of the term.

The LTCC's reliance on ¶¶ 338 and 417 of the *Order* is also misplaced. The FCC's statement that state commissions "need only address routes for which there is relevant evidence in the proceeding…" merely requires the Department to base any findings of non-impairment on relevant evidence; it does not define the evidence that qualifies as relevant. Nor does this statement even remotely suggest that only "route-specific" evidence will be admissible to prove

a transport or loops triggers case. Indeed, the LTCC cannot point to any provision of the *Triennial Review Order* that establishes evidentiary standards state commissions must apply in these implementation proceedings, let alone any provision purporting to override existing state evidentiary rules and impose a new "relevancy" test requiring an incumbent LEC such as Verizon MA to submit unique evidence specifically addressing each particular route or location which it maintains satisfies the FCC's triggers.

Finally, the LTCC argues that Verizon MA should be required to offer "route-specific" evidence as the only means of enforcing the FCC's criteria that an alternative fiber provider must be both willing and able to immediately provision service along a given route in order to be counted toward satisfaction of the wholesale transport trigger for that route. Motion at 5-6. Once again, however, the LTCC is superimposing its own preferred evidentiary test on the *Triennial Review Order* though the *Order* itself provides no such thing. As the LTCC states, the FCC's goal in this area was to "ensure[] that transport can readily be obtained from a firm using facilities that are not provided by the incumbent LEC." *Triennial Review Order* ¶ 412. But the FCC chose to meet that goal not through the means of an evidentiary test but by establishing the substantive criteria noted above, which are designed to winnow out carriers that are not willing or able to "readily" provide transport to other carriers. In other words, the FCC safeguarded its goals simply by making them substantive requirements, which can be met by any form of evidence. Furthermore, the LTCC never explains why route-specific evidence is the only style of evidence that will effectuate the FCC's "willing and able" criteria. Indeed, the evidence submitted by Verizon MA meets these criteria, as further demonstrated below.

II. Verizon MA's Evidence that Particular Carriers Have Deployed Fiber Transport Along Certain Routes and that These Carriers Offer Their Transport Networks in Massachusetts to Others at Wholesale Is More than Sufficient to Support a Department Finding that These Routes Satisfy the Wholesale Transport Triggers.

The LTCC's argument that Verizon MA's evidence fails to make even a *prima facie* case that the transport routes at issue here are available on a wholesale basis, Motion at 7, is unrelated to the relief sought in the motion. That certain evidence might not amount to a *prima facie* case would in no way render that evidence redundant, cumulative, not relevant or otherwise inadmissible. Thus, the alleged lack of a *prima facie* showing affords no ground for striking the evidence that Verizon MA has submitted to date.

The LTCC's argument also fails on the merits. The LTCC attacks only the evidence Verizon MA submitted in its Initial Panel Testimony and completely ignores the additional, detailed information contained in Verizon MA's Supplemental Panel Testimony, much of which comes from the CLECs' own responses to the Department's information requests. In addition, the LTCC would apparently allow the Department to make no inferences whatsoever on the evidence before it, though the Department clearly has the ability, and arguably the obligation,[2] to make reasonable inferences where supported by the evidence.

Specifically, the evidence Verizon MA has offered is more than sufficient to allow the Department to find that the particular routes identified by Verizon MA in its Supplemental Panel

[2] In seeking to strike all of Verizon MA's evidence in support of it wholesale triggers case, the LTCC's Motion is effectively seeking to preclude Verizon MA from proceeding on that case, and in that sense is akin to a motion for a directed verdict. Though the Department has no rule providing for such a motion (a ground in and of itself for denying the LTCC's Motion), the general standard on such a motion is that it must be denied if "anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of" the party moved against. *Turnpike Motors, Inc. v. Newbury Group, Inc.*, 413 Mass. 119, 121 (1992); *see also, Corbin v. Hudson*, 9 Mass. App. 900 (1980) (appellate court will view evidence, including all reasonable inferences therefrom, in light most favorable to party moved against). Thus, if the Department intends to determine, at this early stage of the proceeding, whether Verizon MA has made out a *prima facie* wholesale triggers case, it must include in its assessment not only the hard facts in the record but all inferences that can reasonably be drawn from those facts.

Testimony and Exhibit 3 thereto are offered at wholesale by the carriers also identified in those exhibits, and therefore that the wholesale triggers are met for those routes. Furthermore, Verizon MA's evidence is undisputed at this stage of the proceeding, and therefore not only justifies a conclusion that the triggers have been met but compels it.

As noted in part I.A, above, Verizon MA submitted in its Initial Panel Testimony evidence that three of the carriers it has identified as providers of wholesale transport – Fibertech, AboveNet and Neon – run advertisements on their websites seeking to lease their dedicated transport to other carriers, without exceptions for particular routes. *See* Verizon MA Initial Panel Testimony, at 45-46. Verizon MA also offered evidence that three other carriers it has identified as wholesale transport providers – Williams Local, AboveNet and AT&T – have Massachusetts tariffs on file offering dedicated transport to other carriers. *See id*., Attachment 8. In its Motion, the LTCC attacks other grounds on which Verizon MA may have initially identified carriers as wholesale providers (listing in the New Paradigm Report, providing facilities to lease through Universal Access, use of CATT arrangements), but carefully avoids any attack on Verizon MA's evidence of CLEC advertisements and tariffs.

Moreover, the LTCC's allegation that Verizon MA "chose to ignore" the CLECs' responses to the Department's Information Requests DTE-1-2 and DTE-1-4, Motion at 6, could not be further from the truth. The CLECs' answers to those requests and to Information Requests DTE-1-1 and DTE-1-3 form much of the basis of Verizon MA's Supplemental Panel Testimony, by which it made significant revisions in its case. *See* Supplemental Panel Testimony at 6-8 (incorporating CLEC responses to Information Requests DTE-1-2, DTE-1-3 and DTE-1-4). Not only did that testimony break out Verizon MA's wholesale transport trigger case by route capacity (*i.e.*, dark fiber, DS1 and DS3), but it also removed from Verizon MA's

claim five carriers who stated in response to Information Request DTE-1-4 that they do not offer dedicated transport services in Massachusetts to other carriers.[3] More significantly, Verizon MA revised its entire wholesale trigger analysis to incorporate the CLECs' responses to Information Request DTE-1-2, which confirm and reinforce Verizon MA's case. For example, three CLECs – *****BEGIN PROPRIETARY*** XXXXXXXXXXXXXXXXXXXXXXXXXXX ***END PROPRIETARY***** – admit in response to Information Request DTE-1-4 that they either currently provide dedicated transport to other carries in Massachusetts or could do so if asked. In addition, for each of the ten wholesale transport providers identified in Verizon MA's Supplemental Panel Testimony, at least one CLEC has stated in response to Information Request DTE-1-2 that it has actually obtained transport to a Verizon MA wire center from that provider. In some cases, three or four CLECs have obtained transport from a given provider. *See* Proprietary Exhibit 1 attached hereto, which shows the CLECs who stated, in response to Information Request DTE-1-2 or DTE-1-3, that they have obtained dedicated transport to a Massachusetts wire center from the various wholesale transport providers identified by Verizon MA.

Just as important as what the CLECs have said, however, is what they have not said. Specifically, there is no record evidence showing that any of the dedicated transport facilities on the routes identified by Verizon MA as meeting the wholesale transport triggers at particular capacity levels is not in fact available and offered for lease to other carriers. For example, the CLEC website advertisements referred to above make no exception for certain routes in the state, nor do the tariffs on file with the Department exclude any particular transport routes.

[3] Compare the carriers identified on Exhibit 3 to Verizon MA's Supplemental Panel Testimony with those identified on Attachments 6.B and 6.1.B to Verizon MA's Initial Panel Testimony.

Furthermore, none of the ten carriers that Verizon MA has identified as wholesale providers in Massachusetts has stated in response to the Department's or any party's Information Requests that it does not or cannot offer to other carriers transport at the relevant capacity over any particular route Verizon MA identified in Exhibit 3 to its Supplemental Panel Testimony.[4]

That silence is deafening. Verizon MA has offered substantial, uncontroverted evidence that the carriers identified on Exhibit 3 to its Supplemental Panel Testimony have deployed fiber transport along the routes stated in that Exhibit (a fact that the LTCC does not contest) and that each of them offers its fiber network in Massachusetts for lease to other carriers on a widely available basis, including evidence that they have in fact leased numerous transport routes to other carriers in the state. The LTCC protests that the Department cannot infer from this information that the particular routes at issue here are available and ready to be leased, but the LTCC is intentionally ignoring the obvious. That a carrier is willing to lease certain routes in the state to other carriers implies that it is willing to lease other routes as well, including the routes at issue here. This is especially so in the absence of any information showing that a particular carrier does not offer its network at wholesale or that it does not or cannot offer particular routes. Without any factual basis on which to distinguish the routes that CLECs undeniably do offer at wholesale from those that they allegedly do not offer, the Department can only conclude that there are no such differences, and that all routes deployed by a wholesale transport provider are indeed ready and available for lease.

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[4] AT&T claims, however, that *****BEGIN PROPRIETARY*** XXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX ***END PROPRIETARY*****

For example, *****BEGIN PROPRIETARY*** XXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.**[5] **XXXXXXXXXXXXXXXXX**. *****END PROPRIETARY*****

Accordingly, Verizon MA has presented more than enough evidence to support a finding in its favor that the routes it has identified satisfy the FCC's wholesale triggers, and the Motion must be denied.

Finally, as a procedural matter, the LTCC has offered no reason why the Department should grant it judgment on Verizon MA's wholesale transport case at this early stage of the proceeding, before any CLEC has filed testimony and before Verizon MA has filed its rebuttal to that testimony. The LTCC cannot identify any prejudice it will suffer if the case is allowed to proceed, as a civil defendant might be prejudiced if a jury is allowed to consider an improper case. Given the Department's investigatory role as fact-finder in this proceeding, it should deny

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[5] *See also*, MCI's Response to ATT-CLEC-10, claiming only that its "ability to provide dedicated transport between various points on its network depends upon various factors …" but never stating which routes are or are not available.

the motion and allow the case to proceed through pre-filed testimony and hearing. If at that time the Department does not find that the routes in issue satisfy the FCC's wholesale triggers, then the Department can make its findings based on a full record.

III. Verizon MA's Claim That Certain Routes Satisfy the FCC's Wholesale Trigger for DS1 Transport Is Fully Supported by Information in the Record.

The Department should deny the LTCC's request in the alternative to strike Verizon MA's case with respect to the DS1 wholesale triggers. The LTCC argues that in light of the FCC's statement that "DS1 transport is not generally made available on a wholesale basis," Verizon MA should be required to submit "evidence that the wholesale carriers … offer transport and loops to other carriers at a DS1 level. *See* Motion, at 8-9.[6] The LTCC's argument fails for at least two reasons. First, while the FCC did make the statement alleged, it nevertheless saw fit to create the DS1 wholesale transport trigger, on the basis of its finding that, "wholesale provision of DS1 transport will develop as technology improvements make wholesale provision of DS1 circuits economic …." *Triennial Review Order* ¶ 392. Second, there is substantial support in the record for the conclusion that the transport routes at issue here have been channelized to the DS1 level. Verizon MA explained in its Initial Panel Testimony that it is standard industry practice for carriers who have deployed fiber transport to channelize it to the DS1 and DS3 levels. *See* Verizon MA Initial Panel Testimony at 40-43. Verizon MA also offered evidence that a number of Massachusetts carriers have in fact so channelized their transport networks. *See id.* In addition, no less than four CLECs – *****BEGIN PROPRIETARY*** XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX ***END PROPRIETARY***** – stated in response to Information Requests DTE-1-2 and DTE-1-3 that

[6] The LTCC moves with respect to both Verizon MA's wholesale transport claim and its loops claim but offers no argument or grounds for striking the loops claim; the FCC's statement quoted by the LTCC refers only to transport, not loops.

they have obtained *DS1* level transport from other carriers in Massachusetts, including some of the carriers Verizon MA has identified as wholesale transport providers. Thus, although the FCC's finding may be true on a national level, the ample factual record before the Department fully supports the reasonable inference that wholesale transport providers in Massachusetts offer their transport routes at the DS1 level, among others.

CONCLUSION

For these reasons, the Department should deny the LTCC's Motion to Strike.

Respectfully submitted,

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